In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 75-906

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,

Petitioner,

v.

E. A. SCHLECHT et al, as Trustees of Five Oregon-Washington Carpenters-Employers Trust Funds,

Respondents.

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

A. Respondents' argument concedes, in effect, that the Subcontractors Clause (Art. IV) of the collective bargaining agreement violates § 302(c)(5) if it requires trust contributions for the benefit of a non-contributing subcontractor's employees. Respondents' claim that the clause merely measures contributions of a signatory employer by the hours of work of a non-contributing subcontractor's employees, rather than requiring contributions for the benefit of those employees, is inconsistent with the language of Art. IV

on its face, with its interpretation by the court below and with the practice of union representatives in administering the clause.

The phrase "be liable for these employees wages, travel, Health-Walfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions" in Art. IV refers to a series of payments, including the trust contributions, for the benefit or on behalf of the subcontractor's employees. Language in the three direct benefit trust agreements describing beneficiaries as employees of signatory employers does not accomplish a limitation of beneficiaries to those employees because each trust expressly subjects its terms to those of the collective bargaining agreement. Article IV of the collective bargaining agreement calls for contributions to the trusts for the benefit or on behalf of a non-signatory subcontractor's employees.

The Oregon Supreme Court in this case read Art. IV as requiring contributions for the benefit of the subcontractor's employees. Moreover, evidence in the record indicates that the bank administrator of the trusts and union personnel read it the same way in administration of the trusts. Cases involving garment industry agreements requiring signatory employers to make liquidated damage contributions to trusts, or to make contributions equal to a percentage of payments by an employer to a non-signatory subcontractor, are not helpful in interpretation of Art. IV in this case, calling for payment of "these [the subcontractor's] employees" contributions to the trust.

Article IV is correctly read as requiring trust contributions for the benefit or on behalf of employees of non-signatory subcontractors. Its enforcement therefore violates § 302(c)(5).

B. The Vacation and Apprenticeship Trusts have purposes within those stated in § 302(c)(6), adopted by the 1959 amendment to § 302. Trusts within § 302(c)(6) are, however, subject to the beneficiary requirements of § 302(c)(5).

The intent of Congress in adopting § 302(c)(6) was merely to remove any doubt that vacation, holiday and severance pay and apprenticeship training are permissible purposes for § 302 trusts. Prior to the 1959 amendment, courts had applied the § 302(c)(5) beneficiary requirements to trusts for what became § 302(c)(6) purposes, such as severance pay. The only case on the point since the adoption of § 302(c)(6) in 1959, *In Re Typo-Publishers Outside Tape Fund*, 344 F. Supp. 194 (S.D. N.Y. 1972), aff'd 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973), squarely supports Petitioner's position that subsection (6) trusts are subject to the beneficiary requirements of subsection (5).

Application of § 302(c)(5) to require an apprenticeship training trust to be for the benefit of employees of contributing employers is not difficult to meet, since apprentices are employed by such employers during training or will be so employed at the conclusion of their training. If § 302(c)(6) vacation trusts were not subject to the beneficiary requirements of § 302

(c)(5), such a trust could be used to provide vacations for union officials or other non-employees of contributing employers, contrary to the intent of Congress in adopting § 302.

C. The CIAF Trust may be subject to § 302. Evidence in the record indicates that the collective bargaining agreement, union personnel and the same bank administrator enforce required contributions to this trust to the same extent as the other four trusts. The claim that the CIAF Trust is not subject to § 302 was not made by Respondents in the courts below.

D. Petitioner stands by its argument that the ruling of the Court below, under the circumstances of this case, frustrates the purposes of the Davis-Bacon Act to prevent an employer's cost obligations under a collective bargaining agreement from being a competitive disadvantage in obtaining contracts subject to that Act. Petitioner's argument on this point is properly before this Court.

ARGUMENT

A. The Subcontractors Clause (Art. IV) of the collective bargaining agreement requires contributions to the trusts on behalf of, or for the benefit of, employees of non-contributing subcontractor employers, and cannot be interpreted merely to measure contributions for the benefit of employees of contributing employers by the hours of work of the subcontractors' employees.

The chief argument of Respondents' Brief is that the Subcontractors Clause (Art. IV) of the collective bargaining agreement in this case should be interpreted merely to measure a signatory employer's contributions to the trusts by the hours of work of employees of non-contributing subcontractors, and not to require contributions for the benefit of the subcontractors' employees That argument concedes, of course, that contributions to the Health and Welfare and Pension Trusts, at least, would violate § 302(c)(5) if Art. IV requires them to be for the benefit of a non-signatory subcontractor's employees. See Brief of Respondents at 20, 27-28.

More importantly, Respondents' interpretation of the Subcontractors Clause is inconsistent with the language of the clause on its face and with the interpretation of it by the court below and in administrative practice. The precise language of the clause is (Pl. Ex. 7, A. 78):

> "If an employer, bound by this Agreement, contracts or subcontracts, any work covered by this Agreement to be done at the job site of the construction, alteration or repair of a building, structure, or other work to any person or proprietor who is not signatory to this Agreement, the employer shall require such subcontractor to be bound to all the provisions of this Agreement, or such employer shall maintain daily records of the subcontractors employes [sic] job site hours, and *be liable for payment of these employees wages, travel, Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement*. . . ." (emphasis supplied).

The phrase "these employees wages, travel . . ." obvi-

ously refers to sums paid to an employee for his direct benefit. The immediately following words referring to trust contributions ("these employees . . . Health-Welfare, Dental, Pension, Vacation, Apprenticeship and CIAF contributions . . .") have the same connotation of payments made for the benefit or on behalf of the subcontractor's employees, just as wages and travel pay are for their benefit. It seems clear that Art. IV on its face, requires the trust contributions to be for the benefit or on behalf of the subcontractor's employees.

Moreover, the principal premise of Respondents' interpretation of Art. IV cannot be established. That premise is that the Trust Agreements describe individual beneficiaries of the trust as employees of contributing employers. Therefore, Respondents argue, it may be inferred that Art. IV of the collective bargaining agreement was not intended to require trust contributions for the benefit of employees of a non-contributing subcontractor.

The major difficulty in this premise is that Art. VIII § 1 of the Health and Welfare and Pension Trust Agreements (Pl. Ex. 4, p. 14 of pink pages and p. 14 of blue pages) expressly states that the rights of employees and beneficiaries under the Trust Agreements are "[s]ubject to the provisions of the Collective Bargaining Agreement." The same provision is found in Art. IX § 2 of the Vacation Trust Agreement (Pl. Ex. 4, p. 14 of gray pages). Thus, the terms of the Subcontractors Clause of the Carpenters Master Labor Agree-

ment on beneficiaries of trust contributions required by that clause expands the narrower definition of beneficiaries in the trust agreements.

The Oregon Supreme Court in this case clearly read Art. IV as requiring contributions to the trusts for the benefit of the subcontractor's employees:

> "In this case the requirement of such a written contract was satisfied in that defendant had a written contract with the union which required that he make contributions to the trust funds for his own employees and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement *he would be liable for payments into the various trust funds for the employees of such a subcontractor.*" (540 P.2d at 1015; p. 36 of Brief of Petitioner, emphasis supplied).

The record shows that the bank administrator of the trusts and the auditor appointed by the trustees, as well as union personnel, all regarded Art. IV as requiring contributions for the benefit of specific employees of the non-contributing subcontractor, in the case of at least the Health and Welfare, Pension and Vacation Trusts. The trust officer of the bank administrator for all of the trust funds in this case testified that subcontractor Jackson's non-union carpenter employees could receive benefits from the Health and Welfare and Pension Trusts if they met the eligibility requirements as to number of hours and periods of covered employment (A. 55-60). As to the Vacation Fund, he testified that employees for whom

contributions are made receive payments from the trust, as vacation pay, equal to contributions to the trust on their behalf and their prorata share of earnings of the trust, without any other eligibility requirements (A. 60):

> "Q. How about the Vacation Fund?
> A. The Vacation Fund?
> Q. What are the eligibility requirements?
> A. There is no eligibility requirement. It's whatever contributions are paid in on behalf of the man. He is entitled to those contributions, and there are earnings from the investments. Then it is prorated accordingly by the first dollar in."

The undisputed evidence is that all of the trusts accepted contributions with respect to employees of non-signatory employers if the contributions were reported and paid to the trust indirectly through a signatory employer, such as Petitioner. A. 53, 65-66. The auditor appointed by Respondents for purposes of this case prepared his findings on monthly report forms intended for use by employers in making trust fund contributions (Pl. Ex. 8, blue pages). The auditor listed for each monthly period the name of each carpenter employee of subcontractor Jackson, the hours of carpentry employment by each such employee during the month, and the name of the contributing employer as "Victor L. Jackson (Tom Walsh)." While this practice would not avoid the illegality under § 302 (c) (5) of trusts for the benefit of employees of a non-contributing employer, it signifies the belief of union and trust personnel that contributions under

Art. IV were made on behalf of particular employees of the subcontractor and, in at least the case of the three direct-benefit trusts, for the benefit of those employees.

In short, those concerned with the enforcement and administration of the trusts with respect to employees of non-signatory subcontractors assumed that contributions to the trusts under Art. IV were for the benefit or on behalf of such employees.[1]

Respondents' reliance (Br. of Resp. 29-40) on the *Greenstein, Kreindler and Budget Dress*[2] decisions is

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[1] Contrary to Respondents' argument (Brief 39-40), the Apprenticeship and CIAF Funds can (and must, if subject to § 302(c)(5)) be for the benefit of employees of contributing employers. Art. II § 2 of the Apprenticeship Trust Agreement (Pl. Ex. 4, green pages, p. 4), quoted at Br. of Resp. 53, provides that the Fund shall be used for apprenticeship "or other training programs" for the education of apprentices and journeymen and for other related purposes. Both journeymen and apprentices are employed during their training, or will be employed at the conclusion of their training, by signatory employers, and thereby qualify as employees of contributing employers and proper beneficiaries under § 302 (c) (5).

The only evidence in the record as to the use of CIAF Trust funds is the statement of purposes of the trust in Art. II § 2 of the Trust Agreement (Pl. Ex. 4, yellow pages, p. 2). The stated objects are "promoting safety, education and research and the betterment and advancement of conditions of those engaged in the construction industry within the area covered by the Collective Bargaining Agreement," and certain related purposes, "provided, however, that the Fund shall be used for the benefit of the construction industry generally."

[2] *Greenstein* v. *National Skirt & Sportswear Ass'n, Inc.*, 178 F. Supp. 681 (S.D. N.Y. 1959); *Kreindler* v. *Clarise Sportswear Co.*, 184 F. Supp. 182 (S.D. NY. 1960); *Budget Dress Corp.* v. *Joint Board*, 198 F. Supp. 4 (S.D. N.Y. 1961), aff'd 299 F.2d 936 (C.A. 2, 1962), cert. den. 371 U.S. 815 (1962).

misplaced. The language of the agreements in those cases contrasts sharply with Art. IV of the Carpenters Master Labor Agreement. In *Greenstein*, the Court described the agreement as requiring a signatory employer using a non-union subcontractor to make trust fund contributions computed as a percentage of his payments to the non-union subcontractor for labor, overhead and services, plus a percentage of the signatory employer's own payroll. The contributions based on payments to non-union subcontractors were specifically described in the collective bargaining agreement as liquidated damages for breach of the obligation to subcontract only to union employers. 178 F. Supp. at 684-685.

In *Kreindler*, the Court described the collective bargaining agreement clause as requiring the signatory employer to make contributions to the trust funds in amounts based on its own payrolls and those of non-union subcontractors. 184 F. Supp. at 183. In both *Greenstein* and *Kreindler*, the employer's argument was that required contributions based on the subcontractor's payrolls were illegal because employees of the non-union subcontractors were *not* beneficiaries of the trusts. No one contended that the subcontractor clauses in those garment industry agreements required contributions for the benefit of the non-union subcontractor's employees, unlike Art. IV in this case.

Budget Dress involved a clause similar to those in *Greenstein* and *Kreindler*. The employer in *Budget*

Dress, however, made the same arguments of § 302 invalidity that Petitioner makes here. The Court easily rejected the argument in *Budget Dress* because the subcontractor clause there, unlike Art. IV in this case, did not require trust contributions for the benefit of the non-union subcontractor's employees. Instead, the clause in *Budget Dress* required a signatory employer to make trust contributions for the benefit of employees of contributing employers, based on a percentage of payroll of or payments to a non-signatory subcontractor. Such language is obviously quite different from Art. IV here, which requires a signatory employer to be liable for and pay "these [the subcontractor's] employees . . . Health-Welfare and Dental, Pension, Vacation, Apprenticeship and CIAF contributions in accordance with this Agreement."

Respondents point out (Br. of Resp. 40-49) that health and welfare and pension plans are often based on actuarial assumptions that many employees for whom contributions are made to the trusts will never qualify for benefits from the trusts. Payments to the trusts for such eventually non-qualifying employees thereby add to the benefits available from the trusts to those employees who do qualify. Thus, Respondents argue, the contributions required by Art. IV for employees of a subcontractor may have been intended to enhance benefits available to legal beneficiaries who are employees of contributing employers.

While Respondents' statements concerning actuarial assumptions in such benefit plans may be accu-

rate, there is no evidence in the record here as to what actuarial assumptions were made in establishing the Health and Welfare and Pension Trusts involved in this case. Moreover, the pension plan texts cited by Respondents (Br. of Resp. 43, fn. 14) do not mention any instance in which a trust was based on actuarial assumptions of a certain level of penalty, liquidated damages or other employer contributions not involving hours and periods of work by employees of contributing employers.

Petitioner submits that the Subcontractors Clause in the Carpenters Master Labor Agreement can only be interpreted as requiring trust contributions for the benefit or on behalf of employees of non-signatory subcontractors, which employees are not proper beneficiaries under § 302(c)(5). Art. IV thus requires illegal contributions, in violation of § 302(a), to at least the Health and Welfare and Pension Trusts. The language of Art. IV is not simply an "inartful" shorthand (Br. of Resp. 39) meaning that a subcontractor's payroll is only a measure of contributions to be made by a signatory employer for the benefit of employees of contributing employers.

B. The Vacation and Apprenticeship Trusts are also subject to the beneficiary requirements of § 302(c)(5), and the contributions required by Art. IV to those trusts are also illegal.

Respondents argue (Br. of Resp. 50-54) that the Vacation and Apprenticeship Trusts are created for

purposes within § 302(c)(6), and not subject to the beneficiary limitations of § 302(c)(5).

The only case ruling on the point rejects Respondents' argument, and holds that the beneficiary limitations of § 302(c)(5) apply to trusts whose subject matter falls within § 302(c)(6). *In Re Typo-Publishers Outside Tape Fund*, 344 F. Supp. 194, 196 (S.D. N.Y. 1972), aff'd 478 F.2d 374 (C.A. 2, 1973), cert. den. 414 U.S. 1002 (1973).

As the courts in that case and in *Blassie* v. *Kroger Co.*, 345 F.2d 58, 74 (C.A. 8, 1965), correctly point out, the only purpose of Congress in adding subsection (6) to § 302(c) in 1959 was to remove any doubt that trusts for purposes of vacation holiday and severance pay and for purposes of apprenticeship and training programs are within the exemptions of § 302(c) from the prohibition of § 302(a). See House Report No. 741, 2 U.S. Code Cong. & Ad. News, 1959, at pp. 2445-2446, 2469-2470.

In pre-1959 agreements, courts had applied the § 302(c)(5) limitations to trusts having a purpose, such as severance pay, among those listed in § 302(c)(6) when adopted in 1959. An example is *Greenstein* v. *National Skirt & Sportswear Ass'n, Inc., supra*, involving application of § 302(c)(5) to a severance pay trust, among others. There is no evidence that Congress intended in the 1959 amendments to eliminate the § 302(c)(5) requirements which courts had already held applicable to a trust described in § 302(c)(6). Instead, Congress was simply clarifying the per-

missible purposes for trusts to which payments are exempted by § 302(c).

As this Court noted in *Connell Construction Co.* v. *Plumbers etc. Union*, 421 U.S. 616 (1975), Congress does not always explicitly say what it means in statutory language. There, the "hot cargo" exemption of § 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) was held to apply only to certain collective bargaining agreements, even though Congress did not expressly state that limitation in the statute. 421 U.S. at 628-635. The same situation is present in § 302(c)(6), which was intended to incorporate the limitations of § 302(c)(5) in trusts whose purposes might not be within those stated in that subsection.

Respondents contend (Br. of Resp. 53-54) that imposition of the beneficiary requirements of § 302(c)(5) would make it impossible to create valid apprenticeship and training trusts, "since it is not their purpose to benefit the contributing employer's employees." As noted earlier in footnote 1 to this Reply Brief, Respondents' premises are incorrect. Both apprentices and journeymen are employed during their training programs, or will be employed at the conclusion of them, by contributing employers. Thus, a trust for the purpose of training apprentices and journeymen meets the requirement of § 302(c)(5) that it be established solely for the benefit of employees of contributing employers.

Moreover, Respondents' argument proves too much. If a trust to provide vacation pay is not subject

to the § 302(c)(5) requirement of benefiting employees of contributing employers, there would be no legal restriction on who could benefit from the accumulated vacation trust funds. Such a trust might then be used to provide vacations for union officials, a purpose clearly in conflict with the intent of Congress in adopting § 302 to prohibit bribery and other payments which might be improperly diverted by union officials.

Finally, we note that the Oregon Supreme Court found no distinction between § 302(c)(5) trust purposes and § 302(c)(6) purposes in holding that Art. IV did not violate the beneficiary requirements of § 302(c)(5). It assumed, as the court held in *In Re Typo-Publishers Outside Tape Fund, supra*, that the beneficiary requirements of § 302(c)(5) apply to trusts having purposes within either that subsection or subsection (6).

C. The CIAF Trust may be subject to § 302.

Respondents argue (Br. of Resp. 55-57) that the record shows no basis for a claim that the CIAF Trust is subject to § 302. The question is not very important, in any event, because Art. IV of the collective bargaining agreement and the other four trusts clearly raise the § 302 issue on which Petitioner sought certiorari, and the contributions awarded to the CIAF Trust are miniscule (A. 18, decree as to Case No. 389-038).

We leave to the Court the proper interpretation of the testimony quoted in Br. of Resp. 56-57. In Petitioner's view, it can be taken to mean that the trustor

has appointed some union trustees for the CIAF Trust. Other factual circumstances indicate that the Carpenters Union has clearly taken an interest in an ostensibly employer-controlled trust. Contributions to the CIAF Trust are required by Art. IV. of the collective bargaining agreement, at least where non-union subcontractors are engaged by a signatory employer. All five trusts have the same bank administrator (A. 54), and contributions for all five funds are computed and reported by a signatory employer on a single form (Pl. Ex. 8, blue pages). The same attorneys represent the trustees of all five funds in these consolidated cases, and all five of the cases were commenced simultaneously (A. 1).

On the record of this case, it is difficult to conclude that the CIAF Trust Fund is not within § 302 solely because the trust agreement vests an employer association with authority to appoint the trustees. The courts below did not draw any distinction between the trusts in deciding the § 302 question, and Respondents did not urge below the inapplicability of § 302 to the CIAF Trust.

D. The impact of the holding of the Court below on Davis-Bacon Act purposes is a proper consideration in interpretation of Art. IV of the collective bargaining agreement and § 302(c).

Respondent argues (Br. of Resp. 57-64) that Petitioner has not properly presented to this Court a Davis-Bacon Act issue. Petitioner did not claim in its Petition for Certiorari or in its Brief on the merits

that the holding below violates the Davis-Bacon Act, 40 U.S.C. § 276a. Instead, Petitioner made an accurate argument that § 302(c), as applied by the holding of the Oregon Supreme Court to sustain enforcement of Art. IV of the collective bargaining agreement, under the circumstances of this case, "frustrates the purpose of the Davis-Bacon Act" by making it more expensive for a union contractor to use a non-union subcontractor than a union subcontractor, and not just equally expensive.

The impact of the requirements of the Davis-Bacon Act in this case was a common subject in the trial court proceedings. Petitioner testified at the trial to his belief that union officials unfairly failed to give him notice of their intent to require contributions to the trusts with respect to subcontractor Jackson's employees, even though Jackson was complying with the Davis-Bacon Act by paying the fringe amounts directly to his employees as additional compensation (A. 26-27, 28, 31-32, 70-72).

Petitioner stands by the argument in his opening brief, pp. 19-21, that the impact of the application of § 302(c) by the Oregon Supreme Court decision in this case is to frustrate the purposes of the Davis-Bacon Act to avoid competitive disadvantage from an employer being bound by a collective bargaining agreement with a union.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed, with directions to enter a judgment dismissing Respondents' claims against Petitioner.

Respectfully submitted,

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